UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASE NO. 07-CA-215036

Nexteer Automotive Corp.

and

Local 699, International Union,
United Automobile, Aerospace
and Agricultural Implement
Workers of America (UAW), AFL-CIO

RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

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RESPONDENT'S EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE'S DECISION

I. INTRODUCTION

Consistent with Section 102.46 of the National Labor Relations Board's ("the Board") Rules and Regulations, Respondent submits this Brief in Support of Exceptions.[1] This matter arises out of an unfair labor practice filed against Respondent Nexteer Automotive Corp. ("Nexteer" or "Respondent") by Local 699, International Union, United Automobile, Aerospace and Agricultural Workers of America, AFL-CIO (the "Union" or "UAW"). The hearing of on this matter was held on August 6, 2018. The Administrative Law Judge ("ALJ") issued his decision on December 10, 2018. Respondent now excepts to many aspects of the ALJ's Decision related to alleged violations of Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act ("the Act").

As discussed in Respondent's exceptions and the brief below, the ALJ made erroneous findings, rulings, and conclusions. For example, the ALJ failed to fairly and properly consider the record evidence and applicable legal precedent. The record evidence, when viewed fairly and

[1] Respondent incorporates by reference their post-hearing brief, filed on September 24, 2018, which contains significant additional detail about Respondent, its operations, and various relevant background facts.

consistently with applicable precedent, demonstrates that Respondent acted consistently with its obligations under the Act.[2]

II. QUESTIONS INVOLVED

This case boils down to three determinative issues:

1. Did Joshua Nuffer Bauer's ("Bauer") actions lose protection under the Act, applying the standard set forth in *Atlantic Steel*, 245 NLRB 814 (1979)? (Exceptions 2, 4, 5-8, 10)

2. Did Respondent violate Sections 8(a)(1) and 8(a)(3) of the Act when it discharged Bauer for his hostile and threatening behavior? (Exception 9, 10)

3. Did the ALJ's Decision, conclusions, and proposed remedies properly consider the record evidence and legal precedent? (Exceptions 1-10)

As detailed below and in Respondent's Post-Hearing Brief, the undisputed facts and applicable legal authorities require a resounding "no" to each question. Indeed, the facts and authorities established that:

1. Applying the factors set forth in *Atlantic Steel*, 245 NLRB 814 (1979), Bauer's conduct lost its protection under the Act when he engaged in an unprovoked hostile outburst, yelling "fuck you" repeatedly at Area Manager Benny Taylor ("Taylor") while standing over him in close proximity in a menacing manner, and obviously enraged, within earshot of other employees.

2. Because Bauer's actions lost the Act's protection, Respondent lawfully terminated his employment in response to his hostile and violent outburst.

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[2] References to the ALJ's Decision are identified by the letter "D" followed by page and line number, e.g., "D. ___:___." References to the hearing transcript will be "Tr." followed by the appropriate page number. General Counsel exhibits, Union exhibits, and Respondent exhibits will be similarly referenced "GC Ex.," "U. Ex.," or "R. Ex." followed by the exhibit number. The Complaint is referenced as "Compl." followed by the appropriate paragraph number.

3. The ALJ's findings, conclusions, and proposed remedies fail to properly consider the record evidence, and applicable legal precedent.

III. FACTS

A. BAUER'S DISCIPLINARY HISTORY DEMONSTRATES A WANTON DISREGARD FOR NEXTEER AND ITS SUPERVISORS

The incident which resulted in Bauer's termination was not an isolated event but rather, must be viewed in the context of Bauer's overall record of misconduct. Since Bauer started working at Nexteer in 2011, he has received numerous disciplinary notices based on his improper behavior. In the three years prior to his discharge, Bauer served as a Union district committeeperson, a position providing him full release from work to perform Union duties. While serving a Union committeeperson, Bauer routinely demonstrated complete disregard for Nexteer and disrespect for supervisors.

For instance, on April 30, 2013, Bauer received a balance of shift ("BOS") plus two-weeks suspension for violating Shop Rule #9 – the same Shop Rule involved in the instant case after calling his supervisor a "pompous jackass." (Tr. 51; R. Ex. 8). The Union ultimately agreed that Bauer deserved discipline and a one-week suspension was appropriate. (R. Ex. 9). Less than two months' later, on May 15, 2013, Bauer received a BOS plus 30 days suspension for violating Shop Rule #29, wasting time. (R. Ex. 10). The Union grieved this discipline but ultimately agreed that a BOS plus one week suspension was appropriate for Bauer's misconduct. (R. Ex. 11).

In another demonstration for his lack of respect for supervisors, on March 4, 2015, Bauer received another BOS plus 30-days suspension for a violation of Shop Rules #9 and #13. (R. Ex. 12). In response to Supervisor Sophia Staples' ("Staples") questioning of Bauer's movement of personnel without permission (the subject of previous discipline), Bauer began yelling, arguing he was sick of management's "bullshit" before storming out of the office. (Tr. 47; R. Ex. 12). Bauer

admitted he used profanity in response to a civilized question by a supervisor. (Tr. 47). He did not deny yelling the profanity. This was unacceptable behavior and the Union agreed. While the Union grieved the discipline, it ultimately agreed a BOS plus one-week suspension was appropriate in response to Bauer's actions. (R. Ex. 13).

Despite the numerous warnings, Bauer continued to display blatant contempt for the Company. Less than five months after his outburst at Staples, Bauer made improper remarks to another supervisor. On this occasion, he made an inappropriate comment about a general foreman's sex life in the presence of other employees. (R. Ex. 14). Ultimately, Nexteer and the Union agreed discipline was warranted and that a BOS plus two-week suspension would be served. (R. Ex. 15). Bauer was then terminated on October 15, 2015 for violating Shop Rule #18, "distracting the attention of others or otherwise causing confusion by unnecessary demonstration of any kind on Company premises." (Tr. 149; R. Ex. 16). It was undisputed that this discipline was only resolved as part of negotiations for a new collective bargaining agreement after the Union conditioned the tentative agreement on Bauer being reinstated. (Tr. 150; U. Ex. 1).

Throughout his time as a Union committeeperson, Bauer demonstrated a wanton disregard for generally accepted standards of decorum in the workplace. He routinely chose to interact with supervisors using profanity and displaying contempt. Despite the fact that he was frequently disciplined for his misconduct, he failed to correct his behavior. Instead, on December 13, 2017, Bauer again engaged in one of his profane outbursts, only this time coupled with physical intimidation; at one point, standing over Taylor in close proximity yelling profanities. (Tr. 81). In this context, while the ALJ mistakenly seeks to downplay Bauer's misconduct and assess it in isolation, the true question to be asked in light of Bauer's record is, frankly, when is enough enough?

B. BAUER ENGAGED IN A THREATENING AND PROFANE OUTBURST, LOSING PROTECTION UNDER THE ACT

On November 9, 2017, Bauer met with HR Manager, Steering Division Dereon Pruitt ("Pruitt"), Human Resources Partner Allison Bell ("Bell"), and Union shop committeeperson JoAnn Reyna-Frost ("Reyna-Frost") to discuss issues Bauer had within Plant 3. (Tr. 71). Bauer complained about personal issues he was having with group leaders, Nexteer's front-line supervisors. (Id.). During this meeting, Pruitt asked whether Bauer had raised any of these concerns to Area Manager Benny Taylor ("Taylor"). (Tr. 72).[3] Once Bauer admitted he had not raised issues to Taylor, Pruitt told Bell to set up a meeting with Bauer, Bell, and Taylor. (Id.). Bell coordinated the meeting, scheduling it for November 29, 2017. (Tr. 73). Bauer never responded regarding his availability so Bell rescheduled the meeting for December 13, 2017. (Id.).

The meeting on December 13, 2017 took place in Bell's office. (Tr. 73; R. Ex. 1 & 2). Bell's office is approximately 9.5 feet by 12 feet in size with a desk and two visitor chairs. (Tr. 75; R. Ex. 1 & 2). During the meeting, Bauer and Taylor sat side by side in the visitor chairs while Bell sat directly across from them behind her desk. (Tr. 74). Even though the meeting was set for the express purpose of addressing Bauer's concerns, Bell testified Bauer appeared agitated from the beginning, clenching a pen and wringing it in his hands. (Tr. 76, 79). Taylor confirmed Bauer was aggressive from the beginning of the meeting. (Tr. 106). Prior to the meeting Taylor had not experienced any problems with Bauer but was interested in working out differences between Bauer and some shift leaders. (Tr. 105). Bauer brought up a number of issues including an incident where an employee threw up on the plant floor. (Tr. 77). At the point in the meeting

[3] Significant to the credibility of Bauer and his claims of mistreatment by group leaders is that he never filed a grievance over any of the alleged acts of mistreatment even though he concedes his practice is to file "a lot of grievances." (Tr. 56).

where the puking incident was discussed, Bauer was yelling and his face was changing colors. (*Id.*). The ALJ noted that both Taylor and Bell told Bauer to "calm down." (D. 7:18-19). Taylor did not have a chance to respond because Bauer was changing the subject frequently and not allowing anyone else to contribute. (Tr. 78). In totality, the evidence is undisputed that Bauer spoke approximately 85% of the time. (Tr. 87, 110). Despite Bauer's claim that he and Taylor were "50/50" in their use of profanity, with Bauer maybe using a little more (Tr. 40), both Taylor and Bell denied Taylor used any profanity. (Tr. 81, 109). The ALJ did not find that Taylor used profanity.

Bauer eventually raised the issue of departmental staffing and Taylor responded, mentioning problems with absenteeism. (Tr. 78-79). When Taylor mentioned absenteeism, Bauer became even more upset, his face visibly changing colors and wringing the pen more aggressively. (Tr. 79). Bauer then began pointing at Bell as she sought to discuss the staffing issue. (*Id.*). He told Taylor that employee absenteeism was "not my fucking problem…" (Tr. 80).[4] Bauer then stood up from his chair so he was standing over Taylor, pointing and saying, "Fuck you, fuck you, Benny, fuck you, Benny Taylor." (Tr. 80, 94, 130-131). Taylor had to lean back to get out of Bauer's away to avoid physical contact from Bauer. (Tr. 80, 97, 100, 110). At one point during this rant, Bauer was standing over Taylor in a menacing manner, a mere twelve to sixteen inches away from Taylor. (Tr. 82). Taylor was concerned Bauer might "do something" based on his demeanor and even put his hands up in defense. (Tr. 110, 115).[5] At this point, Bell started walking

[4] The ALJ failed to consider this evidence in his ruling.

[5] While the ALJ notes that the Board applies an objective standard to determine whether conduct is threatening, he similarly discounts Taylor's testimony as "of little, if any, relevance." (D. 8:48). In *Plaza Auto*, 360 NLRB 972, 974 (2014), the case cited by the ALJ in support of his position, the Board did not wholly discount testimony regarding whether statements were perceived as a threat but rather, determined the testimony was "not determinative." Rather than considering Taylor's testimony under the lens of an objective standard (and whether a reasonable

toward her office door, stating that the meeting was over. (Tr. 81, 109-110, 131). She opened her office door to escort Bauer out and while the door was open, Bauer said "fuck you" a couple more times as he was leaving. (Tr. 81, 110, 131). He said it loud enough so that other employees outside Bell's office could hear. (Tr. 81, 110). Bauer conceded in his testimony that engineers were present. (Tr. 49).

After Bauer departed and the meeting was over, Bell called her supervisor Pruitt to report what happened. (Tr. 82). Bell did not immediately suspend Bauer at the end of the meeting because she wanted to ensure that she appropriately addressed the situation given that Bauer was a union official. (*Id.*).[6] After discussing the incident, Bell wrote a statement of her encounter with Bauer. (Tr. 84; R. Ex. 3). Taylor wrote his statement upon his arrival at work on December 14, 2017.[7] (Tr. 111-112; R. Ex. 7). Prior to disciplining Bauer, in accordance with the collective bargaining agreement between Nexteer and the Union ("the Agreement"), Bell conducted a fact-finding meeting with Bauer, referred to by the parties as a "76A conference." (Tr. 37, 85). This conference was delayed because Bauer failed to attend the first scheduled interview. (Tr. 100).

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person would have the same reaction as Taylor), the ALJ wholly ignores Taylor's testimony, finding it irrelevant. This is not the standard applied by the Board. Moreover, as the evidence establishes, Bauer stood over Taylor in a menacing manner, yelling profanities. Taylor had limited space to get away from the conflict. Under these circumstances, a reasonable person would feel threatened and even under an objective standard, Bauer's conduct must be deemed threatening and improper.

[6] While General Counsel has attempted to make much of the failure of Nexteer to take immediate action toward Bauer such as a suspension, any preemptive action before the investigation was complete would have led inevitably to a claim of denial of due process and retaliation. Given that Bauer was a union official with a prior Board case, Nexteer cannot be faulted for exercising care in this instance. Basically, damned if you do and damned if you don't. The timing of the discharge was also delayed by Bauer's failure to attend the first scheduled interview with Bell. (Tr. 100).

[7] The meeting on December 13, 2017 occurred at the end of Taylor's shift and he went home following. He was asked to write his statement when he returned to work the next day. (Tr. 111-112).

Reyna-Frost served as Bauer's Union representative during this meeting. (*Id.*). During this meeting, Bauer remained defiant and failed to respond to the questions asked and instead provided flippant responses. For instance, when asked what he said, Bauer responded "words." (R. Ex. 4). He never denied engaging in the misconduct as alleged nor did he contend he had been provoked. Neither Bauer nor Reyna-Frost challenged in their testimony the accuracy of the contents of the 76A interview notes.

Following the 76A interview and internal discussions, Bauer was discharged based on his violation of Shop Rule #9 as a result of his threatening behavior.[8] (Tr. 88; GC Ex. 5). While it took Nexteer a few days to discharge Bauer for his misconduct, Nexteer was exercising its due diligence in its decision making including discussions between Pruitt, General Director of HR for North America Tony Behrman ("Behrman") and in-house attorney Tamika Frimpong ("Frimpong"). (Tr. 180). This did not minimize Bauer's misconduct in any way. Bauer was not discharged because he raised workplace concerns, or because he was engaged in appropriate actions as a Union representative, or in retaliation for his previous Board filing. (Tr. 88-89). Bauer was discharged only because he engaged in behavior which was so opprobrious as to lose the Act's protection, particularly when viewed in the context of his history of habitual improper conduct toward supervisors.

Nexteer has a code of conduct and a workplace violence policy which prohibit the very type of conduct in which Bauer engaged. (Tr. 91; R. Exs. 19 & 21). Notably, the workplace

[8] Bauer was not terminated as the result of Nexteer's application of progressive discipline, rather in response to his threatening behavior. (Tr. 99-100). As Bell testified the collective bargaining agreement references progressive discipline but does not establish any specific steps that must be followed in applying progressive discipline. (Tr. 99). Rather, the agreement provides that the discipline imposed in any case will "depend[] upon the seriousness of the offense in the judgment of Management." (GC Ex. 2, p. 155) (Emphasis added).

violence policy prohibits "conduct. . . which creates an intimidating, offensive, or hostile environment." (R Ex. 19). This is consistent with Shop Rule #9 which prohibits "[a]ssaulting, threatening, intimidating, coercing or interfering with supervision." (GC Ex. 2). This shop rule was negotiated by the parties and contained in the collective bargaining agreement. The Code of Conduct similarly cautions that "Nexteer will not tolerate any acts or threats of violence, including inappropriate verbal or physical threats, intimidation, harassment, or coercion." (R. Ex. 21). It further cautions that "[a]ny violation of the Code, including the workplace violence policy, may result in disciplinary action – up to and including termination. (*Id.*). Bauer received training on both of these policies in 2017. (Tr. 91, 151-52; R. Ex. 20; R. Ex. 21; R. Ex. 22). Despite this training and his knowledge of Nexteer's policies and expectations, Bauer repeatedly lashed out at supervision under the guise of union activity. On December 13, 2017, Bauer took his misconduct too far when he coupled his usual profanity with threatening and intimidating behavior. For this misconduct, Bauer was discharged. (GC Ex. 5). Bauer was treated no differently than other employees who engaged in violations of the workplace violence policy or Shop Rule #9. (R. Ex. 24 & R. Ex. 25; Tr. 91-92).[9]

[9] No evidence was presented of cases in which other employees engaged in comparable behavior and were <u>not</u> discharged. To the contrary, the evidence is unrefuted that Bauer's termination was consistent with Respondent's historic practices. (R. Ex. 24 & 25). Seeking to distinguish this evidence, the ALJ gratuitously commented, "The record does not reveal whether, as had been the case with Bauer's prior disciplines, the Respondent subsequently reduced the level of discipline imposed on these individuals." (D. 10:24-26). With all due respect, the record evidence is uncontroverted that these were the disciplines imposed. Neither the General Counsel nor counsel for the UAW presented any evidence to the contrary.

IV. ARGUMENT

A. EXCEPTIONS APPLICABLE TO MULTIPLE FINDINGS, RULINGS, AND CONCLUSIONS OF THE ALJ (Exceptions 1-10)

When viewed against the factors established in the Board's seminal decision of *Atlantic Steel Co.*, 245 NLRB 814 (1979), Bauer's threatening behavior lost its protection under the Act. As demonstrated by his history of hostile outbursts, Bauer refused to abide by Nexteer's work rules and this time took his hostility too far – turning a respectful conversation about Bauer's issues into a violent act where he intimidated and threatened Taylor to the point Taylor was concerned for his safety and put his hands up in self-defense. (Tr. 110, 115).[10] Based on this hostile and threatening behavior, Nexteer was justified in terminating Bauer.

The Board holds:

> Where an employee engages in indefensible or abusive misconduct during otherwise protected activity, the employee forfeits the Act's protection. Whether the Act's protection is lost depends on a balancing of four factors: (1) the place of the discussion between the employee and the employer; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.

DaimlerChrysler Corp., 344 NLRB 1324, 1329 (2005) (citing *Atlantic Steel*).

The Board has recognized that employers have a right and responsibility to maintain workplaces free from threats of violence. "[T]he Board will not second-guess an employer's efforts to provide its employees with a safe workplace, especially where threatening behavior is involved." *Bridgestone Firestone S.C.*, 350 NLRB 526, 531 (2007), *citing Tenneco Packaging,*

[10] Even under an objective standard, any reasonable person would be concerned for his personal safety where someone stood in a menacing manner over top of him, obviously enraged, and spewing profanities. Taylor did not have escape options that would not result in contact with Bauer and it was reasonable for Taylor to fear he might be struck, especially given Bauer's demeanor during the discussion.

Inc., 337 NLRB 898 (2002), *review denied* 350 F.3d 105 (D.C. Cir. 2003); *Clark Equipment Co.*, 250 NLRB 1333 (1980). The Board further went on to emphasize, "Employers justifiably are more concerned today than ever about workplace violence and they must remain free to quickly address genuine threats." *Id.* at 536. In this case, Bauer was not privileged to engage in threatening and hostile behavior, even if such threats occurred during the course of union activity.

1. <u>The ALJ Erred in Finding the Place of the Discussion Weighs Toward Protection Where Bauer's Profane Outburst Could be Overheard by Others (Exceptions 1, 3, 4, 6)</u>

In his Decision, the ALJ found that the location of the discussion, Bell's office, weighed toward Bauer's outburst maintaining protection because he "found it unlikely that any other employee heard the conduct." (D. 11:44-45). This finding is contradictory to the testimony presented at hearing. All of the witnesses admitted that Bauer was loud, (Tr. 36, 77, 95, 108, 110, 131), and there were employee work areas outside Bell's office. (Tr. 49, 97). "The location of an employee's conduct weighs against protection when the employee engages in subordinate or profane conduct toward a supervisor in front of other employees . . . . ***The question is whether there is a likelihood that other employees were exposed to the misconduct.***" *Starbucks Corp.*, 354 NLRB 876, 878 (2009) (emphasis added) (finding that even profane conduct in front of off-duty employees weighed in favor of losing the Act's protection). While admittedly, there were no other employees in the office with Bauer, Bell, and Taylor, the undisputed testimony was that Bauer was yelling "fuck you" and it is likely that employees could hear this outburst with both the door closed and open.

While the ALJ relies on the fact that no employees testified that they overheard the outburst (D. 11:42-44), this is only because Nexteer did not go and survey employees after the outburst to determine whether they heard the profanity, drawing more attention to the outburst. As one can

imagine, Nexteer did not want to draw more attention to the outburst or somehow appear to condone the behavior exhibited by Bauer by surveying employees as to whether they overheard. Moreover, the standard is not whether other employees actually heard the inappropriate statements as demonstrated by witness testimony, but rather, "*whether there is a likelihood that other employees were exposed to the misconduct.*" *Starbucks Corp.*, 354 NLRB at 878. In this case, Bauer made no efforts to speak at a volume where others could not overhear him. Instead, he admitted that there were engineering employees outside Bell's office at the time of his outburst (Tr. 49), but nonetheless failed to exercise any level of self-control to ensure that other employees did not overhear his profane outburst. In fact, Bauer admitted he "stated that one 'Fuck you' as [he] walked out of the office." (Tr. 39). Despite this, the ALJ improperly discounted Bauer's own admissions that he was loud and there were other employees outside the office and found there was no likelihood that anyone overheard the outburst.

The ALJ similarly relied on the fact that this was a spontaneous outburst and Bauer did not "expect[] or hope[] that other employees would witness his conduct"; however, this is not the standard established under *Atlantic Steel*. (D. 12:4-5). Even if Bauer engaged in an act of "animal exuberance" when repeatedly yelling, "Fuck you" at Taylor, (D. 12:9-11), this did not weigh toward protection. Instead, the intention of the "location" prong is to insure that outbursts do not "reasonably tend to affect workplace discipline by undermining the authority of the supervisor." *DaimlerChrysler Corp.*, 344 NLRB 1324, 1329 (2005); *see also Piper Realty*, 313 NLRB 1289 (1994). Regardless of whether Bauer intended to make a display of his actions or just managed to do so, his profane outburst directed at Taylor undermined Taylor and Bell's authority to deal with Bauer in a professional manner regardless of work issues. This is exactly the type of conduct the

Board seeks to prohibit. The ALJ erred in finding that the location of Bauer's outburst weighed "heavily" in favor of protection. (D. 11:22-23).

The ALJ similarly erred in discounting Bell and Taylor's testimony that, prior to the conclusion of Bauer's profane outburst, the door to Bell's office was open merely because this detail was not included in their contemporaneous statements. (D. 7:46-8:8). In so doing, the ALJ gives more credence to Bauer's testimony because he did not provide any type of written statement of his account. While Bell and Taylor did not put every detail in their statements, they both provided credible testimony that after Bauer became threatening toward Taylor, Bell opened her office door for Bauer to leave. (Tr. 81, 110). The ALJ held that because this detail was not in their statements, it is not credible. (D. 7:46-8:8). This is nonsensical. Typically, witness statements include the details viewed as "important" by the author but do not contain every potential detail of the events. The fact that Taylor and Bell did not provide an exact chronology of events and did not set out all the *Atlantic Steel* factors does not render their testimony invalid. Moreover, Bell's statement notes that Bauer "stormed out." (R. Ex. 3). This is in no way inconsistent with her testimony that on the way out of Bell's office, Bauer continued his outburst. (Tr. 110). The general term "storm out" generally connotes there was some anger exhibited; Bell just failed to provide all of the written details of what was involved in the "storming out." Moreover, Taylor's statement acknowledged that once Bell started walking toward the door, Bauer yelled "a couple more F Bombs" before exiting. (R. Ex. 7). Taylor did not record the exact moment the door opened in his statement; however, this is not inconsistent with his testimony. The ALJ's blanket rejection of Taylor and Bell's statements merely because they were not as detailed as he would have liked was in error and should be reversed. The ALJ's inclination to give

more credence to Bauer's testimony because it is unsupported by any contemporaneous writing is illogical and must be rejected.

The ALJ then seemed to change course, noting, "[t]o the extent the door may have been open at the very tail end of Bauer's interaction with Taylor, this would be because Bell, not Bauer, chose to open it." (D. 11:25-27). This distinction is irrelevant. While Bell admits she opened the door in an effort to stop Bauer's profane and hostile outburst, this does not excuse Bauer's misconduct. Bauer could have stopped his tirade upon seeing the door was open. He did not. Instead, as Bell and Taylor both testified, Bauer continued to yell "fuck you" at Taylor within earshot of other employees. (Tr. 81, 110, 130-131). Bauer made no effort to contain his profanity to a secluded location and instead, continued to engage in his verbal tirade toward Taylor regardless of the presence of observers.

Where Bauer's outburst was both loud and profane, likely to be overheard by employees outside Bell's office, and continued even after the door to her office was open, the location of the discussion weighs against protection. The ALJ erred in finding this factor of *Atlantic Steel* weighs heavily in favor of protection and should be reversed.

2. The Subject Matter of The Discussion – Bauer's Personal Treatment – Did Not Weigh in Favor of Protection and the ALJ Erred in So Finding (Exception 7)

The ALJ similarly erred in finding that the second prong under *Atlantic Steel*, the subject matter of the discussion, weighed heavily in favor of protection. (D. 12:13-14). In attempting to establish that Bauer was somehow provoked in his behavior (which is wholly irrelevant to the second prong of *Atlantic Steel*), the ALJ noted that the meeting "was called to discuss Bauer's frustration over the Respondent's dismissive treatment of him." (D. 12:32-33). Despite this acknowledgement, the ALJ nonetheless found that the meeting was for the purpose of discussing

issues related to the bargaining unit and therefore, deserved protection. (D. 12:15-18). While the purpose of the meeting was to discuss Bauer's concerns about how he personally was being treated (and not protected concerted activity), the subject matter did move into protected concerted activity where Bauer raised concerns related to other Union members. However, regardless of the content of the meeting, it should not reasonably have incited such hostility from Bauer.

This was not a meeting where Bauer was subject to discipline or which should have incited such emotions. Instead, the meeting was arranged at the direction of Pruitt to address Bauer's concerns, not provoke anger. Contrary to the ALJ's determination that "Taylor did not express concerns or an interest in improving the employer's approach," (D. 12:29-30), the meeting was called for that very purpose. While Taylor did state that nothing could get accomplished when Bauer got hostile, this was only after "Bauer became emotional" and would not allow Taylor or Bell to get a word in otherwise. Essentially, Bauer hijacked the meeting which led to Taylor's comment that, "this is why we can't get anything done" as referenced by the ALJ. (D. 7:19-20). At best, this factor was neutral and neither favored nor disfavored protection. It definitely did not weigh "heavily in favor of protection."

3. <u>The ALJ Erred in Finding the Third Factor, the Nature of Bauer's Misconduct, Weighs in Favor of Continued Protection (Exceptions 1, 2, 5, 8, 9)</u>

In finding that the third prong of *Atlantic Steel* weighed in favor of protection, the ALJ misapplied both the facts and established precedent. As both Taylor and Bell testified, Bauer not only hurled profanities at Taylor, he demonstrated anger – both balling his fists during the conversation (Tr. 81; R. Ex. 3), pointing aggressively at Taylor (Tr. 95, 108; R. Ex. 3), culminating with Bauer standing over Taylor. (Tr. 80, 81, 109, 114). As Taylor testified, "he just got loud and

just start [sic] coming at me, pointing, cursing, you know." (Tr. 108).[11] Despite this testimony, the ALJ contends "[t]he only mention in the trial transcript of Bauer 'balling up his fists' is in counsel's own opening statement," (D. 8:31-32); however, he also acknowledges "Bell did agree that at some point during the 10-minute meeting Bauer 'clenched his fists'" and notes Bell's statement stated that Bauer clenched his fists during the interaction. (D. 8:35-36, 39-40; R. Ex. 3). Apparently, the ALJ attempted to distinguish between "clenched fists" and "balled fists"; however, this is a distinction without a difference. It is apparent the ALJ was attempting to stretch the facts to conform to his determination that Bauer's conduct warrants protection.

Moreover, the ALJ erroneously found in the alternative that even if Bauer did make fists, he did so while still sitting down, (D. 8:41-43), and that this somehow lessens the threatening nature of his conduct. The ALJ ignored that this is not a case where Bauer merely engaged in profanity. Instead, Bauer escalated his misconduct by adding threatening gestures. Regardless of *when* Bauer made fists during the conversation, that is not the reaction of someone calmly engaged in discussion. The ALJ asserts Bauer's behavior was acceptable because Bauer "did not engage in any physical violence, or even touch, anyone" (D. 12:39-40); however, the Board does not require physical violence in order for misconduct to lose its protection under the Act.[12] The ALJ

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[11] In an effort to bolster his analysis, the ALJ characterized Taylor's reference to Bauer's repeated comments as "firing, firing, firing" as an "overreaching" reference to firearms. (D. 9:16-18). Such a suggestion is frankly preposterous.

[12] The ALJ similarly relied on *Alton H. Piester, LLC*, 353 NLRB 369, 374 (2008) in support of his position that Bauer's actions warranted protection; however, in *Alton H. Piester, LLC*, the Board discredited the potential threat of this behavior as given the size of the office, "it would have been difficult for Chapman to move without approaching Derrick." Here, while the size of Bell's office would have required Bauer to walk past Taylor to exit, the confines of the office did not require Bauer to stand over Taylor in a menacing manner while yelling profanities. Bauer voluntarily chose to engage in threatening and hostile behavior. Moreover, in *Piester*, the employee was merely "speaking loudly" about concerns with his paycheck when he stood up and took a step to leave. He did not use profanity or direct any hostility toward any specific person. This is hardly the same as the instant case where Bauer was engaged in a profane tirade directed

repeatedly relied on the fact that Bauer was required to be close to Taylor based on the size of the office in support of his finding but Bauer did not merely sit next to Taylor and get loud. Rather, the testimony at the hearing established that, while obviously enraged (as evidenced by clenching his fists during the conversation), "he got very aggressive," his face changing color, pointing at Taylor, standing up and yelling "fuck you" repeatedly at Taylor. (Tr. 77, 79-80, 108). He was aggressively pointing at Taylor to the extent Taylor had to move backward to avoid being physically touched (Tr. 80, 97, 100, 110).[13] Bauer was then standing over Taylor, continuing to yell "fuck you." (Tr. 81). During this altercation, the evidence is undisputed that Bauer and Taylor were only twelve to sixteen inches apart. (Tr. 82).

While the ALJ found that "Bauer had no choice but to be close to Taylor given the tight confines of the office," (D. 13:13-14), the close confines did not require Bauer to act aggressively or stand over Taylor. While the ALJ relies on *Plaza Auto Center*, 360 NLRB 972 (2014), where the Board found an employee standing up and pushing his chair aside was not threatening in the confines, Bauer did not merely push his chair aside to leave the office. In fact, the testimony established that Bauer stood over Taylor *and only after that point, was he asked to leave and started walking toward the door.* (Tr. 80, 109). Bauer was not simply attempting to exit the office and, given the confines of the space, had to encroach on Taylor's personal space. Bauer stood over Taylor in a threatening manner, pointing his finger and yelling "fuck you." This is completely different from the conduct the Board condoned in *Plaza Auto.*

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specifically at the person he stood over. Bauer was enraged at Taylor and then stood over him, menacingly. This is obviously more threatening than merely standing up during an impersonal conversation about terms and conditions of employment.

[13] Despite Taylor having to move backward to avoid being touched, the ALJ relied on the fact that no contact occurred (*because of Taylor*) as evidence in support of Bauer's actions retaining protection. (D. 12:39-40).

The ALJ similarly erred in relying on *Pier Sixty*, 362 NLRB No. 59 (2015), *enfd.* 855 NLRB 115 (2nd Cir. 2017), in support of his position that Bauer's actions did not lose protection. In so doing, the ALJ completely ignored that the profane language in *Pier Sixty* occurred over social media – an obviously less hostile environment than a profane, hostile tirade in person, which is what occurred in the instant case. Similarly, the ALJ pointed to *Coors Container Company*, 238 NLRB 1312 (1978) to support his position that merely calling an agent of the employer a "motherfucker" is not so opprobrious to lose the Act's protection. The ALJ repeatedly compared Bauer's actions to those in cases where simple profanity was used but Bauer did not just say "fuck you" to Taylor. Instead, he was visibly aggressive and hostile, standing over Taylor, pointing and repeatedly yelling "fuck you" at Taylor. (Tr. 79-80, 109). Throughout his decision, the ALJ references Bauer's "animal exuberance" (D. 12:9, 14:16), but in doing so, the ALJ ignored that Bauer did not have a simple "outburst" but instead, threateningly engaged with Taylor. Had Bauer merely said "fuck you" during the meeting then left, he likely would not have been terminated for his actions. Instead, Bauer engaged in threatening misconduct that must be viewed as such and not downplayed as done by the ALJ.

The ALJ also discredited Bell and Taylor's testimony that Bauer's actions were threatening because Taylor did not stand up or raise his hands. (D. 9:2-3). However, the testimony at hearing established Taylor backed up, trying to get out of Bauer's way. (Tr. 80, 97, 100, 110). While Taylor did not stand up, this would have added fuel to the fire whereby two large men were standing in a confined space, one of whom was acting aggressively. Moreover, it appears the ALJ discredited Taylor's testimony that he did, in fact, put up his hands. "Well, like this, you know, just in case he come up, I could put my hands over my face, but I got to see where he at [sic]. I can't just cover my eyes." (Tr. 115). The ALJ erred in completely disregarding Taylor's testimony

and relying solely on what the ALJ believed would have been an appropriate response to Bauer's actions, standing up.

Further, in determining that the third prong of *Atlantic Steel* weighed in favor of protection, the ALJ wholly failed to consider Bauer's prior discipline where it establishes a repeated pattern of misconduct and compete disregard for Respondent and its supervisors. (D. 4, fn.1). The ALJ found that the "relevance of a pattern of behavior is not clear to me under the circumstances here," (D. 4, fn.1); however, Bauer's discipline history demonstrates Bauer repeatedly used profanity toward supervisors, ignored Nexteer's procedures and standards, and engaged in inappropriate and unacceptable behavior. In fact, the Union signed off on most of Bauer's prior disciplines. Respondent cannot continue to employ an individual who flouts all standards of decorum, regardless of the circumstances. In the instant case, Respondent called a meeting to address Bauer's concerns about his treatment and in response, Bauer became enraged to the point of being profane, loud, and threatening. This is consistent with his actions on countless other occasions. While Respondent did not consider these prior occurrences for purposes of progressive discipline, when faced with credibility determinations and determining whether Bauer was capable of engaging in the behavior as alleged by Respondent, his pattern of behavior demonstrates that he is. Despite his lengthy disciplinary record, the ALJ nonetheless turned a blind eye and reviewed credibility determinations in Bauer's favor, rejecting claims that Bauer acted threateningly or otherwise inappropriately. Respondent submits Bauer's record supports the view that he is not entitled to the benefit of any doubt on the level of discipline that was appropriate here.[14]

[14] The Shop Rules agreed upon by Respondent and the Union specifically state that the level of discipline imposed "depend[s] upon the seriousness of the offense in the judgment of Management." (GC Ex. 2, p. 155).

For all the reasons set forth above, the ALJ erred in finding the third prong of *Atlantic Steel* weighed in favor of protection. Bauer's actions went far beyond what has been deemed acceptable by the Board. He was not merely profane or rude, he was hostile and threatening while being profane. Such behavior is so opprobrious as to lose the Act's protection.

4. **The ALJ Erred in Finding That Bauer's Conduct Did Not Lose its Protection Under the Act and that Respondent Violated the Act in Terminating Him (Exceptions 10, 11)**

As the ALJ noted, the fourth prong of *Atlantic Steel* weighs in Respondent's favor. (D. 15:15-16). For the reasons set forth above, the first three factor of *Atlantic Steel* are either neutral or weigh against protection and the ALJ erred in finding otherwise. Where the first, third, and fourth prongs of *Atlantic Steel* weigh against protection and the second factor, at best, is neutral, Bauer's actions lost protection under the Act. "Where an employee engages in indefensible or abusive misconduct during otherwise protected activity, the employee forfeits the Act's protection." *Piper Realty*, 313 NLRB 1289, 1290 (1994). Because Bauer's actions in this matter did not warrant protection under the Act, Respondent did not violate the Act in terminating Bauer for his hostile and profane outburst. The ALJ erred in finding Nexteer violated Sections 8(a)(1) and 8(a)(3) of the Act where Bauer's actions were otherwise unprotected and warranted termination under Nexteer's workplace violence policy and Shop Rule #9.

V. CONCLUSION

For the reasons discussed herein, Respondent Nexteer Automotive Corp. respectfully asks that the Complaint and underlying charge be dismissed in its entirety; that the exceptions of Respondent Nexteer Automotive Corp. be granted; and that the portions of the Decision of the ALJ addressed above be reversed.

Respectfully submitted,

By: */s/ Kim F. Ebert*

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Dated: January 7, 2019

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEXTEER AUTOMOTIVE CORP.,

Respondent,

and **Case No. 07-CA-215036**

LOCAL 699, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO,

Charging Party.

CERTIFICATE OF SERVICE

I do hereby certify that on January 7, 2019, a true and correct copy of the foregoing Brief was *Electronically Filed* on the NLRB's website http://www.nlrb.gov.

Also, I do hereby certify that a true and correct copy of the foregoing Brief has been served by electronic mail this 7th day of January, 2019 on: Stuart Shoup at SShoup@uaw.net and Scott Preston at preston.scott@nlrb.gov.

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